United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7177

United States Circuit Court of Appeals

SECOND CIRCUIT

No. 75-7177

B P/S

LONG ISLAND LIGHTING COMPANY,

Plaintiff-Appellant,

—against—

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,

Defendants-Appellees.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff-Appellant,

—against—

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,

Defendants-Appellees.

BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Long Island Lighting Company (LILCO) and Consolidated Edison Company of New York, Inc. (CON EDISON) appeal from a judgment of the United States District Court for the Southern District of New York (Wyatt, J.) entered March 5, 1975 granting the joint motion of appellees, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the antitrust

claims of each complaint (the First Claim for Relief of the CON EDISON complaint and the First and Second Claims of the LILCO complaint) on the ground that appellants did not have standing to sue (A177-8).* The Court held, three days after oral argument, that LILCO and CON EDISON were not in the "target area" of the alleged conspiracy and that they were not injured "by reason of" the claimed antitrust violations, within the meaning of Section 4 of the Clayton Act (15 U. S. C. § 15) (A173-4). Notices of Appeal were filed on March 11, 1975 (A179-80). These appeals were consolidated by stipulation of the parties and order of this Court dated March 24, 1975 (A181).

STATEMENT OF ISSUES

1. Were appellants sufficiently within the "target area" of the alleged antitrust violations to have standing to sue under Section 4 of the Clayton Act?

2. Were appellants damaged "by reason of" the alleged antitrust violations within the meaning of Section 4 of the Clayton Act?

3. Did the District Court err in dismissing on the pleadings complex antitrust actions raising substantial issues of fact?

STATEMENT OF THE CASE

A. *The Nature of the Case*

These are antitrust actions brought under Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2) by

*References to "A" are to the Joint Appendix. References to parts of the LILCO Record on Appeal are to "L" followed by the document number from the index to the Record. References to "L40, Ex—" are to sealed exhibits to the affidavit of Asa D. Sokolow sworn to December 20, 1974 (A47-52, which is L 40).

two public utilities, LILCO and CON EDISON, against three major integrated petroleum companies and two of their subsidiaries: Standard Oil Company of California (SOCAL), its wholly owned subsidiary Chevron Oil Trading Company, Texaco Inc. (TEXACO), its wholly owned subsidiary Texaco Overseas Petroleum Company and Mobil Oil Corporation (MOBIL).* The complaints seek injunctive relief and damages in the amount of $186 million and $156 million respectively.

Environmental regulations require that LILCO and CON EDISON burn low sulphur oil in most of their generating plants. They are two of the largest consumers of low sulphur oil on the East Coast of the United States. In September, 1973, the primary available source of this oil was Libya.

The First Claim for Relief of each complaint charges that the oil companies have been engaged in a conspiracy to restrain and monopolize trade and commerce in low sulphur oil to be imported to the East Coast of the United States. The conspiracy began on or about January, 1971, the date of formation of the London Policy Group (LPG), which included most of the world's oil companies. Pursuant to the conspiracy, the oil companies in September, 1973, imposed a boycott on Libyan low sulphur oil, and jointly refused to supply LILCO or CON EDISON or their supplier. As a result, the utilities obtained less of this oil from another source at substantially increased prices. The complaints seek these and other damages caused by the boycott.

LILCO's Second Claim for Relief is much broader than the First. It is modeled on a pending Federal Trade Commission action attacking the entire integrated structure of the oil industry. It charges the oil companies with

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*Appellees as a group are referred to in this brief as "the oil companies".

monopolizing the low sulphur part of the oil industry. The oil companies have restricted production and refining of low sulphur oil in order to limit the supply and to fix and maintain its prices at an artificially high level. LILCO seeks damages for the excess price it has had to pay and injunctive relief to restore a free market.

B. *The Prior Proceedings*

The Court below had before it three different motions to dismiss the complaints: a joint motion by all the oil companies contending that plaintiffs lacked standing to sue (A44), a separate motion by MOBIL and a separate motion by SOCAL (Appendix ii, iv). Although all three motions purportedly were directed to the face of the complaints, MOBIL's motion was supported by an affidavit and extensive exhibits. LILCO and CON EDISON submitted one answering brief in opposition to all of the motions, supported by an affidavit and exhibits, most of which had been obtained in preliminary discovery of SOCAL*.

On the day of argument, Judge Wyatt, *sua sponte,* adjourned the MOBIL and SOCAL motions without date, excluded the affidavit and annexed exhibits of LILCO and CON EDISON, and heard argument addressed only to the joint motion. Three days later the Court dismissed the complaints.**

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*At the time the motions were made, LILCO and CON EDISON had outstanding notices of deposition, requests for production of documents and interrogatories to each of the oil companies. Although discovery was suspended by the Magistrate pending decision on the motions, the Magistrate required SOCAL and, to a more limited extent, MOBIL and TEXACO, to produce certain documents pertinent to the motions, whose production had been agreed to prior to the motions. The documents were produced pursuant to stipulations preserving their confidentiality and limiting their use to these litigations. LILCO and CON EDISON had also taken certain discovery of the New England Petroleum Company.

**The separate motions (Appendix iii, iv) of MOBIL and SOCAL were denied as moot.

The decision of the Court recites that it is based "solely" on the complaints, except for what the Court termed "a few matters outside the complaints" submitted by the oil companies and "not the subject of dispute" (A166a). Although it termed many of the averments of the complaints "conclusory" and "meaningless except as supported by fact averments", the Court, both at oral argument and in its decision, refused to consider any of the facts developed through preliminary discovery by LILCO and CON EDISON and presented to amplify the complaints and to assist the Court in deciding the motion (A168).

STATEMENT OF FACTS

Following is a summary of the facts pleaded in the complaints. For purposes of this motion, the Court below was bound not only to accept those facts as true, but also to construe them in the light most favorable to appellants. Additional facts presented on this motion but excluded by the Court are included where appropriate. Those facts verify or supplement but do not alter the substance or theory of the complaints.

A. *The First Claims for Relief*

LILCO and CON EDISON are public utilities. Each is the sole source of electric power in the area that it serves (A8, 31). The New England Petroleum Company (NEPCO) is one of the largest independent importers, refiners and distributors of oil and is a major supplier to public utilities on the East Coast of the United States (A6, 29). It has been the sole supplier of LILCO's residual oil requirements since 1960 and a major supplier to CON EDISON since 1967 (A9, 32). Environmental regulations require CON EDISON and LILCO to burn low sulphur oil in most of their generating plants (A9, 31). In the year prior to filing the complaints, NEPCO had supplied LILCO and CON EDISON with approximately 20 million barrels of low sulphur oil (A9, 32).

Until September 1, 1973, NEPCO obtained most of this oil from SOCAL (A10, 32, 54), from a concession known as AMOSEAS that SOCAL and TEXACO operated jointly in Libya (A10, 32-3, 55). In 1967 SOCAL entered into a long term supply agreement with NEPCO (A10, 33, 55). SOCAL agreed to supply NEPCO with substantially all of its share of AMOSEAS' output of low sulphur oil and deliver it to a refinery in the Bahamas (BORCO) that SOCAL would own jointly with NEPCO (A10, 33, 55). SOCAL had obtained a 35% interest in BORCO and had agreed to guarantee loans taken out by NEPCO on its 65% interest; upon default by NEPCO, NEPCO's interest in BORCO would pass to SOCAL (A10, 33, 56).

LILCO and CON EDISON were induced to enter into their supply agreements with NEPCO for low sulphur oil on the express representation of SOCAL's officers to officers of each company that SOCAL, in the case of LILCO, "would guarantee an adequate supply of such crude oil for the duration of the agreement", and, in the case of CON EDISON "would support NEPCO and make its exceedingly large crude oil reserves throughout the world available to NEPCO to enable NEPCO to meet its needs" (A9, 32).

The existence of the utilities' long-term supply agreements was common knowledge in the petroleum industry (A9, 32). Their effect was to make SOCAL's Libyan oil a major source of low sulphur oil for the East Coast of the United States. By September 1973, when low sulphur oil was in extremely short supply, it had become the only available source (A59, 80).

The complaints then set forth facts concerning the organization and functioning of the London Policy Group (LPG) and its role in the furtherance of the conspiracy. The complaints charge that the conspiracy commenced on or before January 1971, the date the LPG was formed, and that the specific actions set forth in the complaints were

taken pursuant to agreement among the LPG's major members (A10-1, 33).*

Neither the formation nor the purpose of the LPG was made public in 1971. It's ostensible object was to enable its members—which included SOCAL, TEXACO, MOBIL and most free world oil companies—to conduct joint negotiations with members of the Organization of Petroleum Exporting Countries (OPEC) (A10, 33). Among other things, its members agreed not to reach any individual agreement with an OPEC nation without the consent of the entire LPG and, further, that if an OPEC member retaliated against any LPG member, for example, by cutting back its oil production, the other LPG members would, under certain stated conditions, come to its aid and, if necessary, supply replacement oil (A10, 33).**

Although initially joint negotiations were conducted, a split soon developed in the LPG between its "major" members—including SOCAL, MOBIL and TEXACO—whose primary interests were in the Persian Gulf, and its smaller, "independent" members whose primary interests were in Libya (A11, 33-4; L 40, Ex. 5 at 70000412, Ex. 7 at 50000669, Ex. 12). The majors placed greatest importance on the outcome of the Persian Gulf negotiations, where their holdings were far more vast and more valuable than in Libya (A12, 34). At the end of 1972, the majors agreed to grant a 25% interest in their holdings to the

*The Court below acknowledged that SOCAL, MOBIL and TEXACO were members of the LPG, but chose to disregard the averments as to its activity. Although recognizing that "evidence as to this [LPG activity] might be admissible if there were a trial", in the Court's view these facts "seem to add nothing to the claims of activity by defendants . . ." (A168). Numerous documents from the files of SOCAL pertaining to LPG activity, including handwritten notes of its meetings, were presented by appellants to the Court on this motion.

**A copy of this agreement, the Libyan Producers Agreement or, for insiders, "safety net", was presented to the Court (L 40, Ex. 4). This agreement was not made public in 1971.

Persian Gulf host countries (A11, 34). Libya sought a 51% interest (A11, 34).

In August 1973, a number of the "independents" agreed to grant Libya a 51% interest in their holdings (A11, 34). These companies retained an outright 49% interest and had the right to buy back most or all of the production from Libya's 51% (A11, 34).

SOCAL, TEXACO, MOBIL and the other major LPG members had received similar offers, which they rejected, fearful of the effect acceptance might have on their Persian Gulf interests* (A11-2, 34). Indeed, their reaction to those companies which reached an accommodation with Libya is shown by SOCAL's minutes of an LPG meeting of August 15, 1973, shortly after Occidental Petroleum Co., an independent, had accepted the Libyan proposal. They agreed: "no more liftings" for Occidental by the majors (L 40, Ex. 20 at 50000116).

On September 1, 1973, Libya issued a decree nationalizing a 51% interest in the holdings in Libya of SOCAL, TEXACO, MOBIL and others, including the AMOSEAS' concession (A12, 35). Pursuant to agreements made

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*The LPG had prepared detailed "Terms of Reference" for these Libyan negotiations, which explicity acknowledged the majors' fears of adverse repercussions in the Persian Gulf. The initial question was posed:

> *"What are the limits of a Libyan settlement that could be made that could not be expected to disrupt the Gulf settlement?"* (L 40, Ex. 11 at 70000882).

Indeed at one point the Chairman of EXXON, an LPG major, expressed the view that EXXON:

> *"wd sooner have nat* [*nationalization*] *in L* [*Libya*] *than agree to something—might be better—Gulf imprtant"* (L 40, Ex. 5 at 70000415).

Discussions in the LPG, the documents show, ranged from adjusting the posted prices, rigging the buy-back prices, establishing price floors and restricting production. If none of this worked, the companies would try to *"close Eastern Seaboard of U. S. to Nat'd oil"*, including "following" the oil with a series of lawsuits, in an effort to prevent nationalized oil—or any Libyan oil—from reaching the Eastern Seaboard (L 40, Ex. 5 at 70000416-417).

among certain LPG members, and in furtherance of the conspiracy, SOCAL notified NEPCO that as of September 1, 1973 all deliveries of Libyan crude oil by SOCAL were suspended (A12, 35).* Despite vigorous protest from NEPCO, and pursuant to the conspiracy, SOCAL refused to produce any Libyan oil or handle any exports on behalf of the Libyan Government,** refused to provide any replacement oil, and withdrew its tankers which had been used to transport oil to BORCO for refining (A12-3, 35-6). It did so despite explicit warning from NEPCO that the boycott threatened NEPCO's customers—whose identity the oil companies well knew—with "potentially irreparable damages" (A71).

NEPCO tried to find replacement oil elsewhere; it contacted all companies with interests in Libya, including MOBIL and TEXACO (A90). It had no success.

NEPCO ultimately turned to the "only source of such replacement oil available"—the Libyan National Oil Company (NOC) (A69, 80), and was able to negotiate an agreement with NOC to purchase less low sulphur crude oil, at substantially higher prices and on terms distinctly less favorable than under its contract with SOCAL (A13, 36). Since SOCAL had withdrawn its tankers, NEPCO also had to make its own much more costly transportation arrangements (A13, 36).

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*Once again, the documents show that on September 6, 1973, at an LPG meeting attended by defendants' chief executives, it was agreed to follow the suggestion of SOCAL's Chairman:

> *"not to operate at 49% of normal rate—nor to handle any oil exports on behalf of Libyan Govt"* (L. 40, Ex. 29 at 50000127-128).

Presumably, this is the "fine, patriotic, pro-American objective" that CON EDISON and LILCO, according to the District Court, should have wanted to succeed (A123).

**SOCAL, TEXACO and MOBIL continued the refusal to lift even after notification by the Libyan Government not only that defendants could start lifting their share "right away", but that they could lift 100% if they would acknowledge that 51% belonged to Libya (L 40, Ex. 31).

LILCO and CON EDISON had received notification from NEPCO that replacement oil, to the extent available, would be offered at substantially higher prices (A16, 39). LILCO and CON EDISON tried but were unable to obtain low sulphur residual oil from other sources. No LPG member submitted an offer (A16, 39). LILCO and CON EDISON therefore had no choice—if blackouts and brownouts in their service areas were to be avoided—but to agree to purchase from NEPCO the oil NEPCO had obtained from NOC and refined (A10, 16, 33, 39).*

SOCAL, MOBIL and TEXACO made every effort to prevent the NOC oil from reaching the utilities.

On September 13, 1973, within minutes of each other, NEPCO's executives received threatening telephone calls from SOCAL and TEXACO executives (A14, 37, 65, 92-6, 98-101). These calls were followed by almost identical threatening letters from SOCAL and TEXACO (A14, 37, 71, 72), to which NEPCO replied that the oil previously supplied by SOCAL was, with SOCAL's full knowledge "used primarily to supply low sulphur fuel to Con Edison of New York . . . Long Island Lighting Company . . . and other East Coast utilities" (A72, 103). As the complaints allege, SOCAL, TEXACO and MOBIL knew their boycott would "materially damage" LILCO and CON EDISON and could cause, as NEPCO expressly warned, "severe power blackouts" in their service area (A10, 33, 71-2, 103).

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*The Court made much of the fact that LILCO has brought an action for breach of contract against NEPCO (A171-4). It was a fact outside the four corners of the complaint which was called to the attention of the Court by the oil companies. Unlike the documents offered by the utilities—which the Court ignored—the Court took "judicial notice" of that action and held that LILCO's claim for breach appeared to be its "real" complaint and the only claim it might assert (A171-4). It apparently felt that since LILCO had sued NEPCO, it had no right to bring an antitrust action against NEPCO's supplier and others. The simple fact is that NEPCO claimed that the *force majeure* clause in its contract justified its price increase and relieved it from the contract's maximum price limitations, and LILCO has claimed that it did not.

The threats were followed by the institution by SOCAL, TEXACO and MOBIL (which did not even produce that type of oil in Libya) of a series of groundless lawsuits against NEPCO around the world (A14-5, 37, 67-8).* The lawsuits were intended to stop the flow of low sulphur oil to the United States, to prevent NEPCO from obtaining the needed low sulphur oil from the Libyan Government and to discourage others from making such purchases.**

*The complaint mentions three—discovery uncovered more than 25 (A89). Defendants' internal documents show that they knew that "positive identification" of their oil would be difficult and that although an expert might be able to make the differentiation, "proving it in Court could be another matter." (L 40, Ex. 36). Moreover, defendants knew that British Petroleum Co., Ltd., another LPG major, had made identical claims in the courts of Italy, which were rejected when the court found that British Petroleum never had any ownership interest in the Libyan oil (L 40, Ex. 37). Nevertheless, the oil companies instituted several law suits in Italy. Furthermore, the oil companies knew that under long established Libyan law, the oil companies did not own the oil itself, but only had a contractual right to extract it (Libyan Petroleum Law of 1955).

**The "hot oil" campaign was fully documented. LPG counsel had warned that LPG members "Can't talk about pursuit of hot oil" (L 40, Ex. 38 at 60000926). This injunction was ignored. Their international spy apparatus informed each other as to the loadings and location of ships which loaded oil purchased from the Libyan government, including NEPCO ships (L 40, Exs. 39-51). The Libyan Government, naturally concerned, told the defendants and their co-conspirators that they would be free to lift in excess of 49% of the oil provided they stopped chasing oil (L 40, Ex. 52 at 50000574). Replying on behalf of the LPG, Wiseman of MOBIL on September 30th informed the minister that the companies would not agree to a moratorium on chasing oil lifted by the government (L 40, Ex. 53 at 50000542) and in addition rejected any notion that the companies would act independently (L 40, Ex. 53 at 50000543). Thereafter, MOBIL advised the other companies that they should continue to chase oil (L 40, Ex. 8 at 80003475). The companies did chase and in addition advised each other of the chasing (L 40, Exs. 44, 47, 54, 55, 56). Indeed, the lawsuits had their intended effect for, as MOBIL's own exhibit on its motion demonstrated, (L 26, Ex. K) another United States "independent" oil company, Commonwealth Oil Company, refused to go forward with a crude oil deal with Libya when it learned that "contestable stolen oil" would be involved. Commonwealth "dropped the whole deal" because it had no desire to become embroiled in a "legal tangle" with EXXON, an international "major" oil company and a member of the LPG. (Petroleum Intelligence Weekly ("PIW"), September 24, 1973 p. 4)

Nevertheless, NEPCO succeeded in bringing the oil into the East Coast of the United States, and supplying LILCO and CON EDISON. Blackouts and brownouts were avoided, but LILCO and CON EDISON paid the price. The utilities sustained damages not only from the greatly increased costs to them of low sulphur oil but also from the loss of their 30 day credit terms with NEPCO, the loss of revenues from sales of electric power to other utilities, the loss of business from their present consumers, the loss of present and potential subscribers to several of their electrical services, the loss of goodwill and financial integrity, and the amounts expended to prepare for conversion of a portion of their oil burning capability to a coal burning capability (A16-8, 39-40).

B. *LILCO's Second Claim for Relief*

The District Court did not consider LILCO's Second Claim for Relief, stating that its decision on the First would "necessarily govern" the Second (A112, 166). The Second Claim, however, raises issues much different and much broader than the First.

LILCO's Second Claim charges the oil companies with maintaining a monopoly in the production and marketing of low sulphur oil (the very monopoly sought to be preserved by the oil companies through the actions set forth in the First Claim). Through a series of consortia and joint ventures, the oil companies have obtained control over the major sources of supply of low sulphur crude oil (A20). They have used this power to limit its production, and therefore to limit its supply, despite their awareness that environmental concern has led to requirements that utilities use low sulphur oil in their plants (A19, 20).

Further, the oil companies' control of refinery capacity for refining low sulphur crude oil and for refining high sulphur crude into low sulphur products has been used effectively to limit the supply of low sulphur oil available (A19).

The result has been, as the LILCO complaint charges, that the oil companies have fixed and maintained the price of low sulphur oil at artificially high levels, and LILCO seeks damages for that overcharge (A21).

The oil companies have been able to obtain and to maintain control over the low sulphur market by virtue of their dominant position in the petroleum industry as a whole. The complaint charges them with a monopoly in the petroleum industry in general—evidenced by the control of the seven major LPG members in 1972, through a series of joint ventures and consortia, of 64.2% of all free-world crude oil production, 77.1% of all OPEC production, 77.6% of Persian Gulf and Libyan production and 80% of Persian Gulf production (A20). This control has been extended by the oil companies from merely control of the source of supply of crude oil to control over the means of transporting, refining and marketing of petroleum and petroleum products (A20).

In short, the oil companies—through the LPG—have been able to use their power in the petroleum industry as a whole to obtain monopoly power over the worldwide market for low sulphur oil and, particularly as it affects LILCO, over the market for low sulphur oil in the East Coast of the United States.

THE DECISION OF THE COURT BELOW

The errors in the written opinion of the Court below are substantial and apparent. Indeed, the Court appears to have misunderstood the nature of these cases. Its opinion starts with an inaccurate and misleading summary of the facts of the complaints. These "facts", the Court then holds, "appear[s] to be ruled by *Calderone Enter. Corp.* v. *United Artists*, 454 F. 2d 1292 (2d Cir. 1971), *cert. denied*, 406 U. S. 930 (1972)" (A173). After a 16-line "analysis", the Court concludes that LILCO and CON EDISON were not in the "target area" of the conspiracy, and do not have

standing because the anticompetitive conduct of the oil companies was directed at "Libya or the Persian Gulf states or all of them" but not LILCO or CON EDISON (A174).

It further holds that even if LILCO and CON EDISON have standing (if they satisfy the "target area" test), the complaint "makes it clear" that LILCO and CON EDISON were not injured "by reason of" any antitrust violation (A174). The cause of injury, according to the Court, was NEPCO's price increase, which resulted from Libya's price increase after September 1, 1973, an increase over which the oil companies had no control and from which they received no benefit (A174).

Finally, the Court holds, in effect, that public utilities can never bring an antitrust action (A175). By definition, public utilities are regulated monopolies. As such, they do not engage in competition, and there is "nothing in the complaints" to show that LILCO or CON EDISON suffered any competitive disadvantage and "no such showing could be made" (A175). Since, according to the Court, the antitrust laws permit award of damages only to those who suffer injury in their ability to compete, these complaints must be dismissed (A175).

Indeed, the Court appeared to be bewildered that these complaints were filed at all, going so far as to suggest at oral argument that in its view LILCO and CON EDISON should have wanted the oil compaines to succeed in their illegal boycott of foreign commerce with the United States (A122). Instead of bringing these actions, the utilities should virtually have applauded the "fine, patriotic, pro-American objective" of the oil companies (A123). As the Court saw things, regardless of what the oil companies did in Libya, the "result was precisely the same as if [they] had done what the complaints suggest they should have done, agreed to give up the 51%" (A172). Nothing could be more wrong.

The complaints charge that after the Libyan Governments nationalized 51% of the oil companies' interests in

Libya, the oil companies jointly agreed not to operate in Libya at all, neither on behalf of the Libyan Government, (with respect to its 51% interest) nor on their own behalf (with respect to the 49% interest concededly unaffected by the decree) nor on behalf of any third party. As SOCAL's Chairman put it at a meeting of the LPG—in a document presented to but excluded by the Court—the oil companies jointly agreed:

> "not to operate at 49% of normal rate—nor to handle any oil exports on behalf of the Libya Govt." (L 40, Ex. 29 at 50000127-128).

The oil companies well knew that this decision could have closed the Eastern Seaboard of the United States to nationalized Libyan oil (L 40, Ex. 5 at 70000416-417). Fortunately, it did not have that consequence (a fact which apparently puzzled the Court). It did leave only one supplier in the market—Libya's NOC.*

That basic misreading of the complaints—the Court's failure to appreciate that the defendants jointly agreed not to operate their unchallenged, unaffected 49% interests in Libya or to handle any exports or production on behalf of the Libyan government—accounts for only part of the Court's error. The First Claim for Relief in each complaint alleges that the oil companies' actions were part of an ongoing conspiracy which began as early as January, 1971, with the formation of the LPG, and whose purpose was to monopolize and control trade in low sulphur oil destined for the East Coast of the United States (A8, 31).

The Court termed these averments "meaningless except as supported by fact" (A168). Although the complaints contain sufficient facts, additional facts were presented to the Court, facts which the Court expressly recognized "might be admissible if there were a trial"

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*The price of the only low sulphur oil available to the utilities doubled almost immediately.

(A168). However, the Court concluded that these "admissible" facts "seem to add nothing to the claims of activity by defendants themselves" and "for the present purposes may be disregarded" (A168-9)—overlooking that the oil companies were primary members of the LPG and that the complaints allege that the specific actions involving Libyan low sulphur oil were taken "in accord with agreements among certain LPG members" (A13, 36). By so holding, the Court placed an impossible pleading burden on appellants, criticizing their complaints for not setting forth the facts in great detail (which they were not required to do) and then excluding those detailed facts when offered on this motion.

An even more serious error was made in the Court's rudimentary 16-line "analysis" of the standing requirements. Rather than apply a rule of reason approach to the factual context as mandated by *Calderone,* the Court held simply that only competitors may sue, and if there were an antitrust conspiracy, LILCO and CON EDISON were not its targets. Standing in this Circuit is not and never has been limited to competitors, and, as two of the largest consumers of low sulphur oil, LILCO and CON EDISON were the necessary targets of the illegal restraints imposed upon commerce in such oil.

The Court's "analysis" of the "by reason of" requirement is equally flawed. In effect, the Court held on the pleadings that in order for a plaintiff to bring an antitrust action defendants' conduct must be the *sole* cause of *all* injury. That is not and never has been the law.

LILCO and CON EDISON have alleged that were it not for the boycott, the oil companies would have continued to produce and export at least 49% of their Libyan low sulphur oil entitlement (A12, 35), and that their failure to do so was a material and substantial cause of damage. That is all the law requires, for the matter of causation is for proof at trial.

Finally, none of the Court's reasoning in any part of its opinion is applicable to LILCO's Second Claim for Relief, which charges the oil companies with monopolization and price fixing (A19). Certainly LILCO has standing to assert that claim—it was unquestionably the "target", for it paid the artificially high prices. Certainly too, it was injured "by reason of" the oil companies' conduct. Of course, LILCO is not a competitor of the oil companies. It simply was the victim, as always will be the case where prices are fixed.

ARGUMENT

I.

LILCO AND CON EDISON HAVE STANDING TO SUE UNDER THE ANTITRUST LAWS.

A. *The Court below misapplied Calderone in denying LILCO and CON EDISON standing to sue.*

As the Court below construed the complaints, the antitrust violations engaged in by the oil companies were directed at Libya or the Persian Gulf States or all of them; LILCO and CON EDISON, who were not competitors of the oil companies and who never "bought any of their products", were remote bystanders whose "real complaint . . . is that Libya raised the price of oil" (A171, 173). Without further discussion of its policies, the Court reflexively invoked the "rule" of *Calderone Enter. Corp.* v. *United Artists Theatre Circuit*, 454 F. 2d 1292 (2d Cir. 1971), cert. denied, 406 U. S. 930 (1972), holding that LILCO and CON EDISON were not "targets" of the conspiracy and dismissed the complaints (A173).

By its very language, the *Calderone* decision in and of itself is not dispositive of other cases based on different facts. *Calderone* sets forth the guidelines and policy considerations with which courts should approach the standing

issue in private antitrust actions. It explicit! recognizes that:

> ". . . It is necessary to use a *rule of reason* in construing the requirements of § 4 of the Clayton Act as to standing . . ." 454 F. 2d at 1296 (emphasis added).

Of course, a rule of reason approach is incompatible with a reflexive summary dismissal. Under it, a court must analyze the particular facts of a given litigation and measure them against the public policies sought to be advanced by the antitrust laws. By adopting a rule of reason approach to standing, both *Calderone* and its immediate predecessor, *Billy Baxter, Inc.* v. *Coca Cola Co.*, 431 F. 2d 183 (2d Cir. 1970), cert. denied, 401 U. S. 923 (1971), expressly acknowledge that each case will present its own unique merits in the light of the controlling policy considerations, and therefore the individual facts presented must be analyzed accordingly:

> "These terms do not provide talismanic guides to decision but they do indicate the need to examine the form of the violation alleged and the nature of its effect on a plaintiff's own business activities." *Billy Baxter, supra,* 431 F. 2d at 187.

The disposition of the standing issue in these cases by the Court below does not even purport to attempt to fulfill the requirements of *Calderone.* Without acquiring a full understanding of the facts pleaded, much less attempting to analyze and weigh those facts in terms of the relevant standards, the Court struck the complaints on the basis of one hornbook citation. As concerned as this Court may be with the danger of a proliferation of treble damage suits, that concern should not become a shelter behind which antitrust violators may escape all liability for their illegal conduct.

B. *The rule and policy of Calderone*

In *Calderone* this Court affirmed dismissal of an antitrust complaint on the ground that plaintiff lacked standing. A theatre owner sued for damages caused by an antitrust conspiracy involving and aimed at its lessee-exhibitor, alleging that motion picture exhibitors conspired to allocate first run films among theaters in a manner which effectively block-booked inferior pictures with more desirable movies in his theaters. The theatre owner's rental income, which in part was determined by a percentage of the gross receipts of his lessee, was allegedly reduced as a result of the obligatory screening of the inferior films. Standing was denied to the theatre owner:

> "[I]n order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e. a person against whom the conspiracy was aimed, such as a competitor of the persons sued.
>
> Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves." 454 F. 2d at 1295.

This Court concluded that the target area standard best reconciled the Congressional policy encouraging private enforcement of the antitrust laws with the judicial need to discourage claims for speculative damages, to avoid multiple liability to remote parties in individual cases, and to prevent a deluge of treble damage actions from descending upon the courts.

> "The rationale behind the foregoing demarcation is simple, fair and reasonable. It respects the purpose of § 4 of the Clayton Act, which is to provide a private enforcement weapon that will deter violation

> of the federal antitrust laws by permitting any person injured in his business by reason of an antitrust violation to recover treble the damages actually suffered. It acknowledges that while many remotely situated persons may suffer damage in some degree as the result of an antitrust violation, their damages are usually much more speculative and difficult to prove than that of a competitor who is an immediate victim of the violation. Furthermore, if the floodgates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor or supplier of goods and services that might be affected, the lure of a treble recovery, implemented by the availability of the class suit as facilitated by the amendment of Rule 23 F. R. C. P., would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress." *Id.*

Indeed, the *Calderone* opinion noted that several suits by exhibitors growing out of the conspiracy alleged by Calderone were currently pending. *Id* at 1297.

No particular class of plaintiffs is automatically excluded by the "target area" test. Under § 4 of the Clayton Act, "any person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefor . . ." Although competitors are likely targets of an antitrust conspiracy, this Court in *Calderone* left no doubt that competitors are not the *only* conceivable plaintiffs.

> "We do not suggest that a non-operating theater lessor may never have standing to sue for treble damages under § 4 of the Clayton Act. If Calderone had alleged, for example, that the defendants had aimed their conspiracy at it, such as by agreeing to distribute and exhibit profitable pictures at theaters owned by the defendants or with which they had flat-lease arrangements, and not to distribute them

> to theaters with which they had percentage leases, Calderone would be in a different posture." 454 F. 2d at 1296, n.3.

Similarly, although "not all" individual employees, stockholders or consumers would have standing to sue for injuries suffered by an antitrust victim, clearly some of them would have standing in the proper circumstances. *Billy Baxter, supra,* 431 F. 2d at 187.

Any attempt to construe the boundaries of the target area delineated in *Calderone* to exclude all but competitors is further belied by this Court's assertion in *Calderone* that the result it reached is entirely consistent with two Ninth Circuit decisions sustaining plaintiffs' standing to sue, *Hoopes* v. *Union Oil Co. of Calif.*, 374 F. 2d 480 (9th Cir. 1967) and *Mulvey* v. *Samuel Goldwyn Productions,* 433 F. 2d 1073 (9th Cir.), cert. denied 402 U. S. 923 (1971). 454 F. 2d at 1297, n.5.

In *Hoopes,* the lessor of a gasoline station was found to be a proper party to bring suit for damages resulting from defendant-oil company's exclusive requirements contracts with the lessee-operator of plaintiff's service station. The purpose of the contracts was alleged to have been the foreclosure of plaintiff's station as an outlet for the products of defendant's competitors. Since restricting the use of plaintiff's property was the "aim" of defendant's conduct, plaintiff was within the "target area," "the area which it could reasonably be foreseen would be affected by the antitrust violation." 374 F. 2d at 485.

> "*Appellants claim was not 'derivative' for they sued for damages sustained by themselves and not by their tenants or others. . . .* They [Hoopes' injuries] were not 'remote,' for they were the immediate result of the illegal conduct without intervening cause . . .

It is no bar to recovery that appellants were not competitors of Union, or that applicants' injuries did not result from the allegedly illegal restraint upon the marketing of petroleum products but rather from the means which Union used to accomplish that restraint." Id at 485-6 (emphasis added).

In *Mulvey,* a movie producer alleged that reduced income from his films resulted from defendant-distributor's block-booking of the movies with exhibitors. The court held defendant had "directed his activities at the means of distributing films in order to affect their individual revenue-producing potentials—the target area. Mulvey's films are within this target area." 433 F. 2d at 1076.

In light of the specific language of *Calderone* and *Billy Baxter,* as well as the results in *Hoopes* and *Mulvey* expressly endorsed by this Court, it is apparent that although this Court has attempted to confer a measure of certainty upon the vagaries of standing, a privity* or "competitors-only" rule such as that applied by the Court below was not intended by *Calderone.*

Calderone therefore, was consistent with the Supreme Court's unequivocal construction of the Sherman and Clayton Acts as comprehensive legislation providing a statutory cause of action for a broad class of potential plaintiffs, including but not limited to consumers, purchasers, competitors and sellers. *Mandeville Island Farms Inc.* v. *American Crystal Sugar Co.,* 334 U. S. 219, 236 (1948):

"The statute [Sherman Act] does not confine its protection to consumers, or to purchasers, or to

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*Privity has been irrelevant to suits under § 4 since the very earliest antitrust decisions. *Bigelow* v. *RKO Pictures,* 327 U. S. 251, 255-7 (1948); *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555 (1931); *Vines* v. *General Outdoor Advertising Co.,* 171 F. 2d 487, 491 (2d Cir. 1947).

competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these . . . *The Act is comprehensive in its terms and coverage protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. . .*" 334 U. S. at 236 (emphasis added).

Calderone, through the rubric "target area", establishes a flexible concept, whose proper application depends on analysis of the facts of each case. A rule of reason analysis is necessary to determine whether, in light of the avowed Congressional purpose in enacting the antitrust laws, a particular plaintiff, whether competitor, purchaser, consumer or seller, is or is not entitled to sue for treble damages. After such a review there can be no question but that LILCO and CON EDISON have standing.

C. *LILCO and CON EDISON are within the target area of the alleged antitrust violations*

For the District Court, the complaints were deficient for standing purposes because:

> "Plaintiff is not a competitor of defendants nor has it ever bought any of their products. Plaintiff is a customer of a former customer of one of the defendants . . . No anticompetitive conduct of defendants, however, was directed against plaintiff" (A171-2).

These three sentences, critical to the Court's dismissal, most clearly highlight the Court's misapprehension of the law and misunderstanding of the facts of these cases.

1) *The "competitor" requirement.*

As demonstrated above, it is not now, nor has it ever been the rule in this Circuit or any other Circuit that *only* competitors may sue for damages resulting from antitrust

violations. Such a rule, absurd on its face as a general limitation on § 4, also generates a most anomalous result if applied to conspiracies. If competitors alone can have standing, then a broad conspiracy to fix prices or boycott comprehending *all* competitors, such as that implemented by the oil companies and the LPG in regard to Libyan low sulphur oil, would insulate each conspirator from antitrust liability. Surely § 4 of the Clayton Act does not immunize parties to *per se* antitrust violations because their combination embraces all competitors.

It is hardly surprising therefore, that in other cases where, as in the present case, all competitors jointly agree not to compete, non-competitors who have borne the economic consequences of such collective action have been held to have standing to sue for the damages suffered. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U. S. 390, 396 (1906); *State of West Virginia* v. *Chas. Pfizer & Co.* 440 F. 2d 1079, 1087-8 (2nd Cir.), cert. denied, 401 U. S. 871 (1971); *In re Western Liquid Asphalt Cases,* 487 F. 2d 191, 199-200 (9th Cir. 1973), cert. denied, 415 U. S. 919 (1974); *Atlantic City Electric Co.* v. *General Electric Co.* 276 F. Supp. 59 (SDNY), app. dismissed, 337 F. 2d 844 (2d Cir. 1964).

Hence the first element of the District Court's logic can have no bearing on the determination of standing in the instant case. The oil companies, acting through the LPG, implemented a shut-down of Libyan production and export. If only a competitor of the oil companies could have standing, then there would be no one who qualifies to bring suit for the antitrust violations described in the complaints and the oil companies would be immunized from antitrust liability to private parties.

2) *The "privity" requirement.*

It was also significant to the District Court's decision that plaintiffs bought none of the oil companies' products

directly, but were customers of a "former customer" of SOCAL (A171-2).

The fact is that LILCO and CON EDISON were the largest purchasers of SOCAL's refined Libyan product, low sulphur oil, produced from a concession owned jointly by SOCAL and TEXACO. The utilities acquired this oil through NEPCO, to be sure. But the presence of a refiner-middleman in the circumstances out of which this suit arises does not preclude appellants from recovering their damages from the named conspirators. (*See* p. 39, *infra.*)

NEPCO was a mere conduit through which low sulphur oil passed from SOCAL to the utilities, and the LPG majors were fully apprised of NEPCO's limited role. Indeed, prior to 1967, SOCAL had attempted to market Libyan oil directly to LILCO and CON EDISON (A88). Unable to do so, SOCAL induced LILCO and CON EDISON to enter long-term contracts with NEPCO by express representations that SOCAL would guarantee an adequate supply of low sulphur crude (A9, 32). The relationship between the utilities and SOCAL was sufficiently direct for purposes of standing, and the District Court's concern that the utilities were just a "customer of a customer" is, again, a wholly inadequate basis for the denial of standing.

3) *The "targets".*

Finally, the District Court concluded that no anti-competitive conduct was directed against LILCO and CON EDISON. In other words, appellants were not within the target area of the alleged conspiracy, whose only objects, as discerned by the Court below, were Libya and the Persian Gulf States (A174).

A review of the illegal acts alleged in the complaints reveals that LILCO and CON EDISON must have been, and were in fact, intended targets of those acts, and thereby have standing under § 4 of the Clayton Act and *Calderone*.

The First Claim for Relief describes a conspiracy by the oil companies to restrain trade in low sulphur oil in violation of § 1 of the Sherman Act. The complaints allege that the LPG majors concertedly closed down production of Libyan low sulphur oil in response to the nationalization of 51% of the concessions. Certainly, it was hoped that Libya would thereby reduce its participation demands and restore the oil companies' previous monopoly interest. Hence, Libya was one target of the conspiracy. Without question, a second object of the joint boycott of Libyan oil was protection of the oil companies' shared monopoly interests in the Persian Gulf.

But the complaints go on to allege that the LPG majors jointly refused to deal with LILCO and CON EDISON, first through boycott of NEPCO and then directly after solicitation of offers by the utilities (A13-4, 16, 36, 39). The oil companies then agreed to and did "chase" the "hot oil" to enforce the boycott, and denied transportation to NEPCO.

Having refused to deal with appellants, can the oil companies argue that LILCO and CON EDISON were not targets of that boycott? Although the question seemingly answers itself, since those parties boycotted are quite logically the intended targets of the boycott, even cursory factual analysis will emphasize that LILCO and CON EDISON have standing to sue.

LPG resistance to Libyan demands for greater participation was aimed at maintenance of the majors' control over low sulphur oil production and distribution, as well as to preserve 75% monopoly positions in Persian Gulf production. Subsequent to nationalization, the LPG majors engaged in collective activity designed to reestablish their dominance over low sulphur oil. They recognized that keeping Libyan oil from its few principal consumers—the East Coast utilities—was necessary to achieve this end. If these consumers' supplies went uninterrupted, the lever-

age over Libya inherent in the LPG members' command of market access would be dissipated.

Accordingly, liftings from the 49% of the concessions not subject to expropriation were ceased, buy-back from Libya refused, and a program of common action instituted to prevent low sulphur oil from reaching LILCO and CON EDISON. The LPG majors jointly refused to sell to LILCO and CON EDISON, threatened NEPCO upon its acquisition of oil from NOC, withdrew shipping from NEPCO, and then pursued "hot oil" through groundless lawsuits in an effort to prevent the utilities from receiving the NOC oil obtained.

The immediate objective of the specific *per se* violations alleged in the First Claims of the complaints—joint limitations on production and group refusals to deal—was the isolation of the utilities from their normal supply of low sulphur oil. LILCO and CON EDISON were the explicitly known and intended targets of these antitrust violations.* It was essential to "shoot" these targets if the LPG's effective control over low sulphur oil was to be maintained. In this light, the conclusion below that no anticompetitive conduct was "directed" at the utilities cannot form a basis for dismissing the complaints.

LILCO and CON EDISON are seeking to recover damages suffered as a direct result of the very antitrust violations condemned by the Department of Justice in issuing Business Review Letters requested by the LPG. In a Business Review Letter dated October 5, 1973, Assistant Attorney General, Antitrust Division, Thomas Kauper carefully emphasized that the Department of Justice expressly refused to sanction the type of conduct alleged in the complaints and which has now been substantiated in the preliminary examination of SOCAL's files:

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*NEPCO had informed SOCAL that the boycott would cause its customers, LILCO and CON EDISON, irreparable harm (A71).

"Lastly, let me stress that our non-disapproval is in no way intended to sanction or authorize any *joint oil company action which tends to reduce the supply of petroleum to the United States, such as . . . joint agreements among oil companies to halt production or cease lifting oil in any country, to boycott oil from any country, or to chase so-called "hot oil"*." (L41, pp. 141-2, A154-7) (emphasis added).

The conclusion that appellants have standing to assert these claims is reinforced by examining the express policy objectives enunciated in *Calderone* in light of the instant circumstances. One must start of course, with the Congressional mandate, acknowledged by the *Calderone* court, favoring the private enforcement weapon as a valuable deterrant of antitrust violations. Thus, if appellants were indeed targets of the illegal acts, as has already been amply demonstrated, a presumption exists that these actions should not be terminated in their incipient stages. *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464 (1961).

The countervailing considerations do not operate, in the case at bar, to rebut this presumption. The *Calderone* opinion was concerned over multiple liability to remote parties, speculative damage claims, and opening the "floodgates" of litigation through the vehicle of class actions. LILCO and CON EDISON are decidedly not remote from the violations alleged. They are two of the largest consumers of low sulphur oil sold by the oil companies in the East Coast, and as such, they necessarily bore the brunt of the price increases resulting from the illegal boycott. The utilities are not like creditors, stockholders or employees. They are the parties most directly and immediately injured by the oil companies' antitrust violations and are suing in their own right for these damages.

The relationship between LILCO and CON EDISON, their suppliers and the LPG majors is direct and

unbroken (*See,* Point II, *infra*). The oil companies knew that NEPCO sold their oil to East Coast utilities—in 1967, SOCAL even tried to sell it directly itself. They further knew that when they instituted the boycott in a time of short supply they would choke off virtually the entire supply of Libyan low sulphur oil to the East Coast of the United States and they were expressly warned of the "irreparable damages" it would cause appellants (A71). The damages claimed are hard and calculable, deriving from the increases in the cost of doing business (A16-8, 39-41) incurred by reason of the antitrust conspiracy.

Moreover, multiple liability and a flood of treble damage suits and class actions are not potential hazards if these actions are allowed to proceed. Unlike *Calderone,* no other "target" of the illegal conspiracy described in the complaints has filed a similar claim.*

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*Four private antitrust suits are currently pending against the international oil companies in New York district courts, but the claims there involved are unrelated to those of LILCO and CON EDISON. In *Samuel J. Lefrak et al.* v. *Arabian-American Oil Co., et al.,* Civil Action No. 74-979 (EDNY, filed July 2, 1974), *New York City Housing Authority* v. *Arabian-American Oil Co., et al.,* Civil Action No. 75-15 (EDNY, filed January 3, 1975) and *Rochdale Village, Inc.* v. *Arabian-American Oil Co., et al.,* Civil Action No. 75-135 (EDNY, filed January 29, 1975), landlords are seeking to recover damages under § 1 of the Sherman Act resulting from increased fuel oil prices allegedly caused by the oil companies' broad combination to control the production and distribution of imported Persian Gulf oil as well as domestically produced oil. No antitrust violations directed at low sulphur Libyan oil and its consumers are alleged in the complaints.

An LPG "independent" has filed suit for treble damages against his LPG partners in *Nelson Bunker Hunt* v. *Mobil Oil Corp., et al.,* Civil Action No. 75 Civ. 1160 (SDNY, filed March 7, 1975). The gravamen of Hunt's complaint is that the Libyan Producers Agreement (L40, Ex. 4), as implemented by the LPG majors at the time of Libyan nationalization, violated § 1 of the Sherman Act and resulted in injury to Hunt. Specifically, Hunt charges that the Agreement's vertical restraints on resale and territorial allocations, in effect long prior to 1971, and a partial boycott by the majors in providing Hunt with less replacement oil than he was allegedly entitled to under the Agreement, imposed substantial revenue losses upon Hunt.

None of these suits arises from the antitrust violations detailed in the LILCO and CON EDISON complaints. The latter are

NEPCO, suggested by the Court below and by appellees in their motions below as the proper plaintiff in these actions (A173), is an unlikely plaintiff indeed. Not a publicly held company, NEPCO is a partner of SOCAL in the BORCO refinery and is heavily dependent on SOCAL for its economic well being. Indeed NEPCO was threatened by SOCAL that purchase of NOC oil "would not do any good to the relationship between SOCAL and NEPCO" (A100). Not only were they partners in the BORCO refinery (A10, 33, 55), but NEPCO had pledged the supply contracts with LILCO and CON EDISON to SOCAL as security for various loans. It also appears from the SOCAL documents that NEPCO has reached a settlement with SOCAL which may compromise its right to bring an action (L40, Ex. 65, 66).

In addition, the middleman function performed by NEPCO in all likelihood precludes suit by it against the LPG majors. NEPCO's cost-plus wholesaling implies that it passed on all of the increased prices it paid for low sulphur crude and hence suffered no damages. NEPCO was not a victim of these antitrust violations; if anything, its profits increased. Therefore, NEPCO is precisely the kind of plaintiff vulnerable to defensive use of the pass-on doctrine to bar recovery. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 491 (1968).

Conversely, appellants' customers are also most unlikely plaintiffs in these circumstances unless the courts are to be burdened with still more class suits to the sole benefit of the

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founded on damages resulting from the joint refusal to lift any low sulphur Libyan oil, to provide low sulphur oil to NEPCO, and then LILCO and CON EDISON, and the chasing of "hot oil" to harass and prevent the utilities from utilizing the law sulphur oil obtained from NOC. Additionally, LILCO has asserted a cause of action under § 2 of the Sherman Act alleging a combination and conspiracy to monopolize the production and sale of low sulphur oil and its refined products in the East Coast of the United States.

emerging class suit bar. The injury to each subscriber is too small to justify individual litigation, while the standing to sue of the customers as a class is in serious doubt. *See, Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.,* 315 F. 2d 564 (7th Cir.), cert. denied, 375 U. S. 834 (1963).

The simple fact is that if LILCO and CON EDISON are disqualified, no one will sue the oil companies for the *per se* violations of the Sherman Act described in the complaints. The certainty sought by this Court in *Calderone* was not intended as a mask for immunization of antitrust violators, but such is the result if that decision is applied to the instant case in the fashion of the District Court.

Though the foregoing analysis of the facts dispels any doubts as to the "targeting" of appellants by the LPG majors in execution of their illegal course of conduct, the decision of the Court below was based only on its construction of the First Claims of the complaints. Yet LILCO's Second Claim for Relief, arising under § 2 of the Sherman Act and alleging damages from wholly separate antitrust violations, was also dismissed for want of standing on the basis of the Court's assertion that the decision as to the First Claim "will necessarily govern as to the Second Claim of the complaint in the Lilco action . . ." (A166a).

LILCO's Second Claim for Relief states every essential element for a cause of action under § 2: injury resulting from acts in furtherance of a conspiracy affecting a substantial amount of commerce and performed with a specific intent to monopolize. *American Tobacco Co.* v. *United States,* 328 U. S. 781 (1946); *United States* v. *Yellow Cab Co.,* 332 U. S. 218 (1947); *United States* v. *Consolidated Laundries Corp.,* 291 F. 2d 563 (2d Cir. 1961). If there were an issue as to standing raised by this Second Claim, it was entitled to an independent determination by the District Court rather than the superficial and conclusory treatment it received. As with the § 1 Claims, however, a brief examination of the claim and its factual context establishes LILCO's undeniable standing to sue under § 4 of the Clayton Act.

LILCO's Second Claim alleges that SOCAL, TEXACO and MOBIL have conspired to monopolize and have monopolized the market for production and sale of low sulphur crude oil and products made therefrom in the East Coast of the United States. LILCO's complaint sets forth the common course of conduct pursued by the oil companies and its result—the maintenance and fixing of artificially high prices for low sulphur oil and its products. When monopolization under § 2 is alleged, the focus necessarily shifts from particular restraints of trade which incur liability under § 1, to the ultimate goal for which such restraints are the means, i.e. the collection of monopoly rents through the elimination of competitive forces from the market place. *See e.g., United States* v. *Aluminum Company of America*, 148 F. 2d 416 462-7 (2d Cir. 1945); *United States* v. *Standard Oil Co. of New Jersey*, 221 U. S. 1, 50-62 (1911); *United States* v. *American Tobacco Co.*, 221 U. S. 106, 175-80 (1911). The target area of such an enterprise is the entire market to be monopolized, and the targets are those consumers of the commodity who will pay the monopoly rents.

In the case at bar, it is apparent which parties comprise the targets of the conspiracy to monopolize the stated market. Low sulphur oil is absolutely vital to the production of electric power within governing environmental restrictions. Electric utilities consume by far the greatest amount of low sulphur oil imported into the East Coast. One of the largest purchasers of low sulphur oil is LILCO. It must have standing to sue for damages suffered by reason of appellees' § 2 conspiracy as a principal target of that conspiracy.

LILCO and CON EDISON contend that given a proper application of the law of standing in this Circuit to the case at bar, there is not a shadow of a doubt that they have standing to sue under § 4 of the Clayton Act. The ruling of the District Court denying appellants standing should therefore be reversed.

II.

LILCO AND CON EDISON WERE INJURED "BY REASON OF" THE ANTITRUST VIOLATIONS OF THE OIL COMPANIES.

The second ground of the Court below for dismissing the complaints was that they did not satisfy the requirement of § 4 of the Clayton Act that a plaintiff's injuries must occur "by reason of" antitrust violations in order to sustain a private antitrust action (15 U. S. C. § 15). This conclusion was based on the Court's view that "no 'causal connection', either 'clear' or otherwise" was shown between the claimed antitrust violations and the damages alleged, and that the complaints did not demonstrate any injury to the utilities' "competitive position" and no such showing could be made, since, as regulated monopolies, utilities rarely compete (A174-5). Once again, the Court's conclusion rests upon a misreading of the complaints and a misapplication of the governing law.

A. *A clear causal connection exists between the antitrust violations of the oil companies and the injuries of LILCO and CON EDISON.*

As the Court read the complaints, the cause of injury to LILCO and CON EDISON (and their "real complaint") is that "Libya raised the price of oil", which increase NEPCO passed on to them (A173). "The benefit of these increases went all to Libya; defendants received no part of the increases" (A173). Although apparently conceding a right of action by NEPCO against SOCAL, the Court held that, "Certainly the business decision of Socal [and the other defendants not to lift any Libyan crude oil] was no wrong to plaintiff, which bought no oil from Socal" (A173).

Thus, the Court dismissed the claims on the basis of a holding tantamount to engrafting a "privity", or "first purchaser" requirement on § 4 of the Clayton Act in contraven-

tion of previous authority. Moreover the Court mistakenly held that the complaints challenge only the single-firm conduct of SOCAL: the concerted refusal to deal by the LPG majors, the decisive factor compelling LILCO and CON EDISON to pay, through NEPCO, whatever price Libya demanded, was ignored. These basic misconceptions pervade the entire opinion.

1) *There is no first purchaser rule.*

It is axiomatic that privity of contract is not relevant to private antitrust actions. (*See,* p. 22, *supra.*) Equally well settled, is the principle that second and even third tier purchasers and not merely the "first purchaser" may recover damages resulting from antitrust violations. *Hawaii* v. *Standard Oil Co. of Calif.,* 405 U. S. 251 (1972); *Perkins* v. *Standard Oil Co. of Calif.,* 395 U. S. 642, 647-8 (1969); *State of West Virginia* v. *Chas. Pfizer & Co.,* 440 F. 2d 1079, 1087-8 (2d Cir.), cert. denied, 404 U. S. 871 (1971); *In re Western Liquid Asphalt Cases,* 487 F. 2d 191, 199-200 (9th Cir. 1973), cert. denied, 415 U. S. 919 (1974); *Boshes* v. *General Motors,* 59 F. R. D. 589 (ND. Ill. 1973); *State of Washington* v. *General Electric Co.,* 246 F. Supp. 960 (WD Wash. 1965). In point of fact, privity or lack of it, and a plaintiff's position in the chain of distribution are never determinative of "causation" for purposes of maintaining a private antitrust action.*

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*The Court noted, without deciding the issue, that a "first purchaser" principle would be a "substantial" defense to these actions (175-6). Such a holding would be, of course, contrary to the authority cited above. *Donson Stores, Inc.* v. *American Bakeries Co.,* 58 F. R. D. 481 (SDNY 1973) cited by the Court below in support of a "first purchaser" rule, is inapposite. In *Donson,* a class of 20 million consumers of bread was denied intervention in a class suit by bread retailers against bakeries for alleged price fixing. The Court specifically held that the retailers were not conduits which passed on the alleged overcharges to the consumers. The consumers suffered no direct injury and were therefore denied standing. The case at bar presents the reverse situation, *i.e.* NEPCO *is* a conduit which did pass on the increased price of low sulphur oil to LILCO and CON EDISON.

2) *The causation or "by reason of" requirement.*

Focusing on conditions not essential to the issue of causation under § 4, the District Court lost sight of the relevant standards for adjudication of this question articulated in *Billy Baxter, Inc.* v. *Coca-Cola Co.,* 431 F. 2d 183, 187 (2d Cir. 1970), cert. denied 401 U. S. 923 (1971). In an extensive discussion of causation in the antitrust context, this Court in *Billy Baxter* held that § 4 required only that the nexus between alleged illegal acts and consequent injury be such that the illegal acts could be adjudged by the trier of fact a "material cause" of, or a "substantial factor" in the occurrence of the injury. Stated otherwise, the injury must result "directly" rather than "incidentally" from the claimed antitrust violations. 431 F. 2d at 187.

Although in promulgating this test, the Court meant to narrow the field of antitrust plaintiffs, it is just as obvious that the Court below had no power to exclude all plaintiffs not in privity or not dealing directly with named defendants. So restrictive a reading of § 4 is entirely inconsistent with the repeated decisions of the Supreme Court which have construed the Clayton Act to mandate a broad scope for the private enforcement of the antitrust laws. *Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.,* 364 U. S. 656, 660 (1961); *Radovitch* v. *National Football League,* 352 U. S. 445, 453-4 (1957); *Mandeville Island Farms Inc.* v. *American Crystal Sugar Co.,* 334 U. S. 219, 236 (1948); *Bigelow* v. *RKO Radio Pictures,* 327, U. S. 251 (1946); *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555 (1931). Specifically addressing itself to a dismissal on the pleadings, the *Radiant Burners* decision concluded:

> "By § 1, Congress has made illegal: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States. . . ." *Standard Oil Co.* v. *United States,* 221 U. S. 1. *Congress having thus prescribed the criteria of*

> *the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.*" 364 U. S. at 660 (emphasis added).

See also, Mandeville Island Farms, supra.

Hence, contrary to the District Court's ruling, allegations and proof that the oil companies' acts were the only cause of injury or that they were an independently sufficient cause,* or that privity or direct dealing existed between the utilities and the oil companies, are not prerequisite to the maintenance of a private antitrust action. The limitations imposed by the Court below on compensable antitrust claims constitute the very expansion of the "criteria" of the Sherman Act's prohibitions expressly rejected in *Radiant Burners* as unduly restrictive of the Congressional mandate vested in the antitrust laws.

A private antitrust complaint must therefore be sustained if its allegations indicate that the illegal acts were a substantial or material or direct cause of the injury. *Billy Baxter, supra,* 431 F. 2d at 187. On any reading of the complaints in the case at bar, and on any reasonable understanding of what "substantial," "material" or "direct" connote, there can be no question but that the illegal joint actions of SOCAL and its LPG partners substantially, materially, and directly caused injury to LILCO and CON EDISON. Furthermore, it becomes apparent that

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**Bigelow, supra,* at 264-5; *Story Parchment, supra,* at 566; *Terrell* v. *Household Goods Carriers' Bureau,* 494 F. 2d 16, 20 (5th Cir. 1974); *Ford Motor Co.* v. *Webster Auto Sales, Inc.,* 361 F. 2d, 874, 885 (1st Cir. 1966); *Switzer Bros., Inc.* v. *Locklin,* 297 F. 2d 39, 47 (7th Cir. 1961), cert. denied, 369 U. S. 851 (1962); *E. V. Prentice Machinery Co.,* v. *Assoc. Plywood Mills,* 252 F. 2d 473, 479 (9th Cir.), cert. denied, 356 U. S. 951 (1958).

their purchase through NEPCO at a price set by Libya does not vitiate this necessary conclusion.

The damages of the First Claim for Relief represent the difference in the price paid for low sulphur oil before and after the implementation of the alleged antitrust violations by the oil companies, as well as other increased costs of doing business. In the District Court's view, the only cognizable cause of these damages was the price Libya charged for its oil after the boycott, and therefore, the utilities have no cause of action against the oil companies. However, this view is tautological, for it is a rare case indeed where a buyer pays a price other than that charged by his seller.

If the Court below had analyzed the central issue in this case, namely the reasons why the utilities had to pay the high price for low sulphur oil demanded by Libya, it could not have reached the conclusion it did.

The incontestable answer to this question lies in the crucial fact, conspicuously absent from the Court's recitation of the facts, that after September 1, 1973, the oil companies and the other LPG majors jointly agreed to, and did in fact, refuse to lift any oil from Libya, including any from their 49% share of the Libyan concessions unaffected by the September 1 nationalization decree, and agreed to and did in fact refuse to deal with NEPCO, with LILCO and with CON EDISON. The immediate consequence of this concerted action in violation of § 1 of the Sherman Act was that the utilities, through NEPCO, were compelled to obtain their requirements of low sulphur oil from the only remaining supplier, the Libyan government, at an initial price double that of their previous purchases. The vital importance of low sulphur oil to production of electricity on the East Coast left the utilities with no alternative, as the oil companies well knew.

Had the oil companies continued to lift from their remaining 49% of the Libyan concessions and had SOCAL fulfilled its contractual obligations to NEPCO and its guar-

antees to LILCO and CON EDISON, then these damages would not have occurred. At the very least, any price increase would have been limited by the Libyan government's authority to raise prices only with respect to the 51% of production expropriated; even that authority might not have been exercised if the competitive discipline deriving from the oil companies' continuing production and sale at established prices from their 49% had been present.

But for the antitrust violations alleged, NEPCO would have obtained from SOCAL, and delivered to the utilities, the necessary low sulphur oil at prices similar to, if not the same as, those in effect prior to nationalization. Contrary to the Court's facile conclusion that "the result was precisely the same as if defendants had done what the complaint suggests they should have done . . ." (A172), the illegal acts on the part of the LPG majors were thus utterly critical to the occurrence of plaintiffs' injuries. Either the alleged concerted limitation of production and group refusal to deal were material, substantial, and direct causes of plaintiffs' injuries, or those terms have no content whatsoever.

The factors underlying this part of the District Court's decision, purchase through NEPCO at a price set by Libya, are not germane to the causation issue in the case at bar. Assuming that the relationship between the utilities and SOCAL had traditionally been one of direct dealing (i.e., neither NEPCO nor any other intermediary was involved in the production of low sulphur Libyan oil and its delivery to the utilities in New York), it would be undebatable that the utilities could recover against the oil companies and their LPG partners upon proof of the antitrust violations alleged in the complaints. Any other conclusion would necessarily imply that victims of a group boycott have no right of action under the Sherman Act, and hence cloak with immunity parties to concerted activity conclusively adjudged illegal *per se*. *Klors Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 297 (1959).

The role of NEPCO does not alter this result. NEPCO is a conduit; it buys oil from the majors, refines it, and resells it at a fixed percentage markup to its customers.* SOCAL's documents reveal that NEPCO's middleman function was explicitly recognized by the LPG producers of Libyan oil (L 40, Ex. 66 at 20001333). The latter knew that sale to NEPCO was in reality a sale to LILCO, CON EDISON, and other East Coast utilities which SOCAL, at an earlier date when oil was in oversupply, had indeed attempted to deal with directly. Hence the relationship between the utilities and SOCAL, for antitrust purposes, is no less direct here than if NEPCO played no part in the transaction.

Similarly, the fact that NEPCO's price to LILCO and CON EDISON reflected the increased price charged by the Libyan government has no significance in determining the substantial cause of the alleged injuries. When a group refusal to deal compels resort to the only remaining significant supplier of the commodity required, the identity of that supplier, and the reasons behind its pricing policy are immaterial to the adjudication of the boycotters' liability. *See, State of Washington* v. *American Pipe & Construction Co.*, 280 F. Supp. 802, 807 (D. Wash. 1968).

Given the utilities' dependence upon low sulphur oil, it could not be argued, for instance, that injury in the form of price increases reflecting higher transportation costs in obtaining such oil from another country would not be the direct result of the LPG shut-down of Libyan production. Unless the established construction of the Sherman Act were to be disregarded, these damages would be compensable under § 4 of the Clayton Act.

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*Although in the District Court's opinion any liability in this case runs to NEPCO only, NEPCO's essentially "cost plus" wholesaling would preclude any recovery on its part upon defensive invocation of the pass-on doctrine by SOCAL. *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 491 (1968).

The same result applies, *a fortiori,* to the instant case. When SOCAL, TEXACO, and MOBIL jointly ceased all liftings, the government of Libya became the sole source of available low sulphur oil and that sole supplier chose to raise its price drastically. Given the LPG members' joint elimination of competition, LILCO and CON EDISON had to accept that price, passed on to them by NEPCO. Since an individual seller may validly charge whatever price he wants for his product, logic compels the conclusion that the oil companies are liable for the damages resulting from the increased price the utilities paid for low sulphur oil, irrespective of who the only seller was or why the high price was set. *See* discussion in *State of Washington* v. *American Pipe and Construction Co., supra,* 280 F. Supp. at 806-7.

> "If plaintiffs can establish as a matter of fact (1) *that they paid more for pipe purchased from non-defendant non-conspirators than would have been paid absent the alleged conspiracy,* and (2) that [defendant's] alleged participation in an anticompetitive conspiracy was the cause of such overpayment, nothing in the law will preclude recovery from [defendant]. Plaintiffs' ability to prove such facts is for the jury to decide, not this court." 280 F. Supp, at 807 (emphasis added).

Any possible objections to these complaints grounded in the act of state doctrine are thus dispelled. The price charged by Libya was a sovereign act, but as just demonstrated, that act is not at issue in this suit. Appellants claim damages which resulted directly and substantially from the private acts of private parties, SOCAL, TEXACO and MOBIL. For present purposes, the Libyan government must be regarded as merely another seller of oil, the only available source of low sulphur oil after the LPG shut-

down, and the defendants conceded as much below. Adjudication of the oil companies' liability is, then, entirely independent of consideration of sovereign action.* *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 706 (1962). *See also, Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (CD Cal. 1971), aff'd. *per curiam,* 461 F. 2d 1261 (9th Cir.), cert. denied, 409 U. S. 950 (1972).

In light of this analysis, the fallacy inherent in the District Court's causation rationale is transparent. To state that the alleged damages were "caused" by NEPCO because NEPCO's prices reflected Libyan government price increases or if NEPCO did not cause the injury then the Libyan government did (A170, 172-3), is to trivialize the standards for suit under § 4 established by this court and to gut the Sherman Act's most basic anticompetitive prohibitions. The District Court's decision effectively confers total immunity from liability upon parties to a conspiracy and measures taken pursuant thereto in direct violation of the antitrust laws. Such a result should not be allowed to stand.

It is important at this point to stress that LILCO's Second Claim for Relief arising under § 2 of the Sherman Act was again erroneously subjected to the District Court's simplified causation analysis with none of the separate consideration it warranted. LILCO's complaint alleges that the oil companies' conspiracy to monopolize the market for low sulphur crude oil and its refined products in the East Coast of the United States, evidenced by the concerted action outlined in the complaint, resulted directly in damages to the utility. The allegations of the Second Claim, which

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*The District Court, on the other hand, without determining the issue, thought the act of state contentions raised by defendants in this case were "substantial" (A175-6). This dictum reveals an inadequate understanding of the facts involved. The claims arise from the reactions of the oil companies to Libyan nationalization. The validity of sovereign acts is not at issue.

completely satisfy the pleading requirements of the Federal Rules and which must be accepted as true on motions on the pleadings, are clearly the type which can be fully developed only upon extensive discovery. Sweeping this claim under the rug, as the District Court attempted, contradicts the unequivocal Supreme Court holdings disfavoring summary dismissals of antitrust actions. *Poller* v. *Columbia Broadcasting System, supra.*

B. *Appellants, as public utilities, are not barred from recovering damages under the antitrust laws.*

The Court below found further that even if the damages claimed by LILCO and CON EDISON were caused by the alleged antitrust violations, the injuries suffered were not compensable under the antitrust laws. Since the utilities are regulated monopolies and do not compete, the claimed injuries could not constitute damage to their "competitive position in the business in which [they are or were] engaged," citing this Court's decision in *GAF Corp.* v. *Circle Floor Co.,* 463 F. 2d 752 (2d Cir. 1972), cert. denied, 413 U. S. 901 (1973) (A175). Absent a showing that appellants suffered competitive disadvantage by virtue of the illegal acts, the complaints could not, according to the District Court, survive summary dismissal.

The necessary implication of the District's Courts misapplication of the *GAF* holding to the case at bar is an anomolous result indeed—public utilities victimized by antitrust violations have not now and can never have a right of action under the antitrust laws. This conclusion contradicts the prevailing authority.

In the first place, the injuries suffered by LILCO and CON EDISON are of the type which have been recognized from the very earliest days as proper objects of treble damage suits under the antitrust laws. The complaints allege that the antitrust violations there outlined resulted in substantial increases in the utilities' costs of doing busi-

ness, i.e., higher prices for oil purchases, investment in coal conversion, and increased financing costs. There is no question but that such cost of business damages are compensable under § 4 of the Clayton Act. *Hawaii* v. *Standard Oil Co. of Calif.*, 405 U. S. 251 (1972); *Thomsen* v. *Cayser,* 243 U. S. 66. 88 (1917); *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U. S. 390, 396 (1906); *Straus* v. *Victor Talking Mach. Co.*, 297 F. 791, 803 (2d Cir. 1924); *Atlantic City Electric Co.* v. *General Electric Co.*, 226 F. Supp. 59, 61 (SDNY), app. dismissed, 337 F. 2d 844 (2d Cir. 1964).

Moreover, the *GAF* position that an antitrust plaintiff must allege injury to its competitive position clearly is irrelevant to public utilities by reason of the natural monopoly character of such enterprises. Rather than excluding utilities from the class of plaintiffs eligible to sue under § 4, the *GAF* decision is limited to its facts in further elucidating the standing requisites for some plaintiffs in antitrust cases in the Second Circuit.

The *GAF* court clearly did not intend, for instance, to preclude state and municipal governments from recovering injuries sustained by reason of antitrust violations. Such entities do not compete in a market and hence can suffer no competitive injury, but it has never been doubted that they retain a right of action under § 4. *Hawaii* v. *Standard Oil Co. of Calif., supra,* 405 U. S. at 262; *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d 1079 (2d Cir.), cert. denied, 404 U. S. 871 (1971); *State of Minnesota* v. *U. S. Steel Corp.*, 438 F. 2d 1380 (8th Cir. 1971); *In re Western Liquid Asphalt Cases,* 487 F. 2d 191 (9th Cir. 1973), cert. denied, 415 U. S. 919 (1974). Yet under the District Court's interpretation of the applicable law these plaintiffs would have no standing to file antitrust suits.

Similarly, public utilities have never been foreclosed from bringing treble damage suits on the grounds of their special status as regulated monopolies which generally do

not compete in the production and distribution of utility services. *See e.g., Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.,* 335 F. 2d 203 (7th Cir. 1964); *Atlantic City Electric Co.* v. *General Electric Co., supra.* Given that the cost of essential services provided by utilities hinges directly on the prices paid to suppliers of commodities necessary to production of those services, protection of the public served by a utility requires that it have the ability to recoup losses suffered as a result of antitrust violations on the part of such suppliers. Indeed the substantial public interest inherent in a utility's position, as well as the wide sweep of the Sherman Act's intended operation as construed in the language of *Mandeville Island Farms* (quoted *supra* at p. 22-23), puts the holding of the court below in total opposition to controlling public policy and legal authority.

Analysis of the *GAF* decision emphasizes its limited application. That case arose in the aftermath of an unsuccessful attempt by a large purchaser of floor tile to take over a manufacturer of such tile. Plaintiff, the target of the takeover, charged that pursuant to a conspiracy to acquire corporate control defendant decreased its purchases from plaintiff in order to make plaintiff's stock price decline. Defendant would thereby purchase plaintiff's shares more cheaply and effect the takeover. Damages sought were the profits lost from the partial boycott and the expenses incurred in resisting the takeover.

Judge Gurfein dismissed the complaint, 329 F. Supp. 823 (SDNY 1971), on the ground that plaintiff failed to allege a conspiracy or concerted refusal to deal. Since only one business entity was alleged to have boycotted plaintiff, no violation of § 1 of the Sherman Act, requiring joint action of multiple parties, could possibly be proven. 329 F. Supp. at 827-8.

This Court affirmed, 463 F. 2d 752 (2d Cir. 1972), finding that plaintiff had failed to allege sufficient facts to establish that the claimed refusal to deal resulted

in any damage to GAF. Although lost profits were sought, there was no allegation that GAF's total sales had decreased. 463 F. 2d at 759. Indeed, discovery had shown that defendant's purchases of floor tile from GAF had actually increased substantially during the time of the alleged boycott. As GAF did not allege that its ability to compete in the floor tile market was affected, no antitrust damages were suffered. *Id.*

While this Court spoke in general terms in holding injury to competitive position prerequisite to an action under § 4, the essential feature of the GAF case was that plaintiff had suffered no damages. As Judge Gurfein stated in a later case, ". . . GAF simply was not injured by any antitrust violation." *International Rys. of Cent. Amer. v. United Brands Co.,* 358 F. Supp. 1363, 1371 (SDNY 1973).

The facts of *GAF* and those of the case at bar could not be more dissimilar, and hence the ruling in *GAF* could not be more inapposite. The complaints in these actions plead with specificity each element of a claim under §§ 1 and 2 of the Sherman Act, and explicitly define the damages suffered. Invocation of the *GAF* decision to disqualify all public utility plaintiffs under § 4 was clear error on the part of the District Court in the instant case.

Therefore, appellants submit that the damages alleged in the complaints were caused "by reason of" the alleged antitrust violations of SOCAL, MOBIL and TEXACO sufficient to satisfy § 4 of the Clayton Act, and that those damages are antitrust damages fully compensable under § 4. The decision of the District Court should, in these respects, be reversed.

III.

THE DISTRICT COURT'S DECISION CONTRADICTS THE LAW APPLICABLE TO JUDGMENTS ON THE PLEADINGS.

The law governing disposition of motions addressed to the pleadings in federal courts could not be more clear.

The District Court was under an unequivocal obligation to construe the complaints liberally, resolving all doubts in plaintiffs' favor and sustaining them unless no facts could possibly be *proven* which would entitle the utilities to relief. *Conley* v. *Gibson,* 355 U. S. 41, 45-6 (1957).

The strong public policy advanced by private enforcement of the antitrust laws, as well as the complex factual issues inherent in such suits requiring extensive discovery procedures, together have impelled the Supreme Court and this Court to emphasize that any pleading requirements in excess of the minimum demanded by the Federal Rules are particularly inappropriate to antitrust complaints. *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 467 (1961); *Radovitch* v. *National Football League,* 352 U. S. 445 453-4 (1957); *United States* v. *Employing Plasterers Ass'n. of Chicago,* 347 U. S. 186, 189 (1954); C. E. *Stevens & Co.* v. *Foster & Kleiser,* 311 U. S. 255, 260 (1940); *Nagler* v. *Admiral Corp.,* 248 F. 2d 319, 322 (2d Cir. 1957).

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition of unreasonable restraints of trade' . . . and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws to an aggrieved party. These laws protect the victims of the forbidden practice as well as the public . . . *In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in the laws."* *Radovitch* v. *National Football League, supra,* 352 U. S. at 453-454 (emphasis added).

The District Court's approach to the complaints in this action was wholly inconsistent with the controlling au-

thority. Rather than construe the complaints in a manner most favorable to plaintiffs, as all the settled precedents require at such an early stage of an antitrust suit prior to full discovery, the District Court misread the pleadings such as to impose an insuperable burden on plaintiffs. The Court condemned the complaints for insufficient detail in establishing an antitrust violation while at the same time refusing to consider the detailed facts offered on this motion. Though excluding the documention presented by the utilities to supplement and amplify the complaints' allegations, the District Court proceeded to reach factual determinations as to causation of injury and scope of the oil companies' illegal activities which should properly have been left for trial. *Perkins* v. *Standard Oil Co. of Calif.*, 395 U. S. 642, 648 (1968); *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 567 (1931); *Package Closure Corp.* v. *Sealright Co.*, 141 F. 2d 972, 977 (2d Cir. 1944). Quoting *Story Parchment*, this Court held:

> "Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value was a question, upon the evidence in this record, for the jury, 'to be determined as a fact, in view of the circumstances of fact attending it.'" *Package Closure, supra,* 141 F. 2d at 977.

At a minimum, the District Court was constrained by the decisions of this Court to grant the utilities leave to amend the complaints to correct any perceived defects in the pleadings. But the Court below denied even this opportunity to the utilities, stating in effect that there were no facts which could be pleaded to make the complaints sufficient (A175). This Court has consistently ruled that dismissal without leave to amend is a clear abuse of discretion where the defects are non-jurisdictional. *Klebanow* v. *N. Y. Produce Exchange*, 344 F. 2d 294 (2d Cir. 1965); *Neeff*

v. *Emery Trans. Co.*, 284 F. 2d 432 (2d Cir. 1960); *Nagler* v. *Admiral Corp., supra; Dunn* v. *J. P. Stevens & Co., Inc.*, 192 F. 2d 854 (2d Cir. 1951).

Under governing standards of pleading, however, these complaints do not require amendment to be sustained. The complaints describe in detail how the LPG majors orchestrated a joint shut-down of Libyan production, a group refusal to deal with NEPCO, and then LILCO and CON EDISON, and the chasing of "hot oil" in an effort to enforce the boycott. Ultimate acquisition of less oil from NOC at a much higher price was thereby necessitated. The complaints detail that the various injuries sustained resulted from the conspiracy and boycott. On their face, the complaints in this action more than fulfill every requirement essential to pleading a cause of action under the antitrust laws. *Radiant Burners, supra; Radovitch, supra.* Their dismissal by the District Court for failure to state a claim was plain error.

Moreover, substantial public interests are involved in this action which are ill served by the District Court's hasty disposition of the claims. Public utilities are unlike other antitrust plaintiffs. Their operations are highly regulated and their injuries necessarily impact on a broad mass of service customers who have no alternative sources of utility services. Injury to each individual subscriber is obviously too small to warrant litigation, but taken together, the total increase in the costs of electricity which result from the oil companies' antitrust violations represents a vast misallocation of social resources. The utilities are the only plaintiffs in a position to correct this imbalance. LILCO and CON EDISON have already committed themselves to distributing damages recovered for the fuel price increases in this action, under Public Service Commission supervision, to their subscribers.

Perhaps the most disturbing element of the District Court's ruling was that both law and policy were undercut

by a decision that rested on mistakes of fact. The Court's apparent misunderstanding of the complaints was reflected in its failure to comprehend at oral argument the uniqueness and non-interchangeability of low sulphur oil (A139-44) despite appellants' constant reminders that use of such specialized oil was necessitated by environmental regulations; its characterization of the refusal to deal with NEPCO as a single-firm business decision by SOCAL in the face of allegations in the complaints and documentation of concerted oil company activity (A142-5); its failure to take cognizance of the central fact that the oil companies jointly refused to lift any oil from the 49% of their concessions unaffected by nationalization (A146); its failure to note the oil companies' joint refusal to supply shipping to NEPCO (A143); and its inability to perceive antitrust violations despite allegations and documentation of the specific oil company activity condemned by the Department of Justice (A138-61, esp. 154-7).

In light of its misapprehension of the import of these complaints, the District Court's refusal to consider the documentation presented on the motions seems particularly inappropriate, if not an abuse of discretion. Prior to rendering judgment on the pleadings in a case which is both highly complex as well as infused with the public interest, the District Court was obliged to consider all facts presented. This the Court below did not do.

IV.

CONCLUSION.

The judgment of the District Court in dismissing the complaints must be reversed if the relevant law is to be properly applied and long standing substantial public policies are not to be frustrated.

Given a "rule of reason" analysis and a "material factor" test as established by this Court, all doubts that LILCO and CON EDISON were "targets" of the anti-

trust violations alleged, and that their injuries resulted "by reason of" those violations, dissolve. There are no privity, first purchaser, "single-cause", or "competitors-only" doctrines which bar these actions. Appellants have standing to sue under § 4 of the Clayton Act.

Moreover, this action involves precisely the kind of issues which should not be disposed of on the pleadings. To the extent that liberal rules of pleading have been held especially important in the antitrust context to encourage private enforcement, the District Court's determination nullifies an express public policy judicially affirmed time and again.

For all of the above reasons, appellants submit that the decision of the District Court dismissing the complaints should be reversed.

May 2, 1975

Respectfully submitted,

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